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IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.150 OF 2019

Smt. Chaya Tarachand Naik
W/o. Tarachand Naik,
Aged 35 years, Housewife,
R/o. H.No.234, Toni Nagar,
Sanvordem, Sanguem – Goa.

... Appellant

Versus

1. Shri Dattaprasad Shrinivas Desai,
S/o. Shrinivas Desai,
Major of age, R/o. H.No.1,
Ambeshi, Pale – Goa. 403 401
(Driver and owner)

2. United India Insurance Company
Limited, 1, Ashirwad, Gaunekar
Building, Kavlem Road, 403 401,
North Goa.

.... Respondents

Mr Vishal Sawant, Advocate for the Appellant.

Mr A.R.S. Netravalkar, Advocate for Respondent No.2.

CORAM: M. S. SONAK, J.

DATE : 12th NOVEMBER 2022

ORAL JUDGMENT :

1. Heard Mr Vishal Sawant for the appellant and Mr Netravalkar for respondent no.2 – Insurance Company.

2. The appellant–claimant challenges a judgment and award dated 30.07.2019 in Claim Petition No.115/2016, dismissing her Claim Petition for her inability to prove that the accident was caused due to the rashness and negligence on the part of respondent no.1 (Dattaprasad Desai), the driver and owner of Maruti Versa vehicle bearing no.GA-02-S-0399. The Tribunal, in this case, computed the compensation otherwise payable to the claimant at ₹6,53,400/-, but the Tribunal held that since the issue of rashness and negligence was not proved, no compensation was payable to the appellant–claimant.

3. Mr Sawant, learned Counsel for the appellant, submits that the appellant's husband, who was driving the Maruti Omni car when the accident occurred, was acquitted in Criminal Case no.47/S/2018 from the charge of rash and negligent driving. With the leave of the Court, he places on record a copy of the judgment and order dated 02.11.2020, acquitting the appellant's husband.

4. Mr Sawant states that even otherwise, the evidence on record establishes that the accident occurred due to the rash and negligent driving of respondent no.1 – Dattaprasad Desai. He submits that the evidence of the eyewitness Rajesh Borkar (AW7) is quite clear, and the Tribunal was not justified in discarding his

evidence by holding that AW7 was a got-up witness. He submits that on a holistic consideration of the evidence on record, it is apparent that the accident was caused due to rash and negligent driving of respondent no.1. He submits that the offending vehicle was overloaded with saplings. This aspect was also not considered by the Tribunal.

5. Based on the aforesaid, Mr Sawant submits that the impugned award to the extent it answers the issue of rashness and negligence against the appellant may be interfered with, and the compensation computed by the Tribunal be awarded to the appellant.

6. Mr Netravalkar submits that the acquittal in Criminal Case No.47/S/2018 is entirely irrelevant. First, he offers that the panchanama and the sketch establish that the appellant's husband drove the Maruti Omni car on the wrong side. Second, he submits that the appellant and even her husband admitted the correctness of the sketch. Third, after their investigations, he offered that the investigating agencies filed a charge sheet against the appellant's husband for rash and negligent driving. Finally, he submits that Rajesh Borkar was a planted witness, and the Tribunal rightly discarded his testimony.

7. Mr Netravalkar, without prejudice, submitted that there was no evidence to take the appellant's notional income at ₹10,000/-. He submits that this income could have been taken maximum at ₹5,000/- on a notional basis. Based upon this, Mr Netravalkar submits that computation of compensation would come to a maximum of ₹4,81,400/-. However, he submits that no compensation is payable because there was no negligence on the insured vehicle's driver.

8. For all the above reasons, Mr Netravalkar submits that this appeal may be dismissed.

9. The rival contentions now fall for determination.

10. Upon considering the rival contentions and material on record, the following two points arise for determination:

(a) Whether the finding of the Tribunal on the issue of rashness and negligence warrants interference.

(b) Does the compensation amount determined by the Tribunal represent "just compensation"?

11. On the first point, the appellant examined herself as AW1, her husband Tarachand Naik, who was driving the Maruti Omni car, as AW5 and an eye witness Rajesh Borkar as AW7.

12. Dattaprasad Desai (RW1) and Digambar Talekar (AW8), ASI attached to the Canacona Police station, have also deposed in this matter on the issue of rashness and negligence. With the assistance of the learned Counsel for the parties, I have gone through the depositions of the above witnesses and the documents produced by them. Upon evaluation of their evidence, I think that both Dattaprasad Desai (driver of Maruti Versa) and the appellant's husband, Tarachand Naik (driver of Maruti Omni), were equally responsible for the accident that occurred on 22.09.2015 and in which appellant sustained injuries resulting in her permanent disability to the extent of 13%. The reasons for the above conclusion are discussed after this.

13. The appellant and her husband, Tarachand, have deposed in this matter. They have stated that the accident took place solely due to the rash and negligent driving of Dattaprasad Desai, the driver of the Maruti versa. However, they have not seriously disputed the position of the vehicles, at least after the accident, as reflected in the sketch attached to the panchanama. Their only case was that the sketch reflected the position after the accident. Their case also was that on account of the impact, the vehicles appeared as if the Maruti Omni was not precisely on the right side but a little towards the wrong side.

14. In the cross-examination, the suggestion put to Tarachand Naik, the appellant's husband, who was driving the Maruti Omni, was that he was exhausted after celebrating five days of Ganesh Chaturthi festivity and, therefore, strayed on the wrong side. However, there is no clear suggestion about Tarachand Naik driving the vehicle fast or in a rash and negligent manner.

15. The Investigating Officer, Digambar Talekar (AW8), was admittedly not an eyewitness to the accident. However, he did state that at the time of drawing the panchanama, the drivers of both vehicles were present along with the panchas. This, at the highest, indicates that the panchanama was correctly drawn, and even the accident sketch reflects the position of the vehicles post the accident. However, Digambar Talekar (AW8) also admitted that the point of impact was shown to him by Dattaprasad Desai, the driver of the Maruti Versa, and it is based on this information that the point of impact was reflected in the sketch. Furthermore, there is evidence that Tarachand was at the site, but after about 20 minutes, he began to feel giddy and had to be moved to the hospital, where the appellant was already being treated. Therefore, there is medical evidence which corroborates this circumstance.

16. Digambar Talekar deposed that his investigations *prima facie* revealed the negligence of Tarachand and, therefore, FIR

and, consequently, a charge sheet was also filed against Tarachand Naik.

17. Dattaprasad Desai (RW1) has also deposed in this matter. His version is that there was no fault on his part and the entire accident was due to Tarachand Naik. He denied the suggestion that the police drew the point of impact only as per his disclosure. However, the Investigating Officer admitted in cross that the point of impact was as per Dattaprasad's indication/disclosure.

18. The crucial witness, in this case, is, however, Rajesh Borkar. He has deposed about the accident and suggests that the accident occurred due to the rashness and negligence of Dattaprasad. Significantly, he has deposed that the police also recorded his statement. Therefore his presence at the site need not have been doubted. He denied the suggestion about his not being the person at the site at the time of the accident. Except for this suggestion, there is nothing on record to indicate that Rajesh Borkar was not even present at the site of the accident. To that extent, the finding recorded by the Tribunal about Rajesh being a got-up witness or about Rajesh not being present at the site is incorrect. Rajesh has spoken about how Dattaprasad overtook him at an incredible speed and collided with the Maruti Omni.

19. The acquittal recorded by the JMFC in Criminal Case no.47/S/2018 is not very relevant because, based upon such an acquittal, it cannot be said that Tarachand Naik was not at all responsible for the accident. However, if the acquittal judgment is perused, it is apparent that the star witness (PW1) was Dattaprasad Desai, the driver of the Maruti Versa.

20. Before the JMFC, Dattaprasad stated that he did not wish to depose anything in this case and did not wish to proceed with the complaint. Similarly, Ravindra Savaikar, one of the panchas, also deposed that he did not want to proceed with the complaint. However, these witnesses filed a written application at Exhibit 13 before the JMFC. Thus, Dattaprasad Desai, before the Tribunal, stated on oath that the accident occurred due to the rashness and negligence of Tarachand. But before the JMFC, Dattaprasad refused to depose. This renders Dattaprasad's testimony suspect. Dattaprasad was possibly unprepared to face any cross-examination before the JMFC or otherwise had no qualms about not speaking the truth.

21. Therefore, upon holistic consideration of the evidence on record, I am satisfied that both Dattaprasad and Tarachand contributed equally to the accident that occurred on 22.09.2015,

in which the appellant suffered injuries and consequent disability to the extent of 13%.

22. Now coming to the second point of determination, there is merit in Mr Netravalkar's contention that the finding about the appellant's notional income being ₹10,000/- being not backed by any material whatsoever. There is no discussion of why the amount was taken at ₹10,000/- per month. Mr Netravalkar is justified in contending that this amount should have been taken at ₹5,000/- in the peculiar facts and circumstances of the present case. Significantly, the appellant made no claim based on her notional income. There were no pleadings on the aspect of notional income. Not that any pleadings are necessary, but neither in the pleadings nor in her evidence the appellant suggested any figure about notional income.

23. If the notional income is taken at ₹5,000/-, as it should be in the present case, then the compensation amount will have to be reduced from ₹6,53,400/- to ₹4,84,200/-. This is because there was no challenge on the other components by either Counsel.

24. The just compensation, in this case, should therefore be computed at ₹4,84,200/-. However, since Dattaprasad Desai had

contributed to the accident to the extent of only 50%, the respondents will have to pay the appellant compensation of ₹2,42,100/- together with interest at the rate of 7% per annum from the date of the claim petition till effective payment.

25. Accordingly, the appeal is partly allowed. The finding on rashness and negligence recorded by the Tribunal is interfered with to the extent indicated in this judgment and order. The respondents are directed to jointly and severally pay the appellant compensation of ₹2,42,100/- together with interest at the rate of 7% per annum from the date of the claim petition with effective payment.

26. Respondent no.2 – Insurance Company is directed to deposit the above amount in this Court within eight weeks from today after giving due intimation to the learned Counsel for the appellant. Once this amount is deposited, the appellant will be at liberty to withdraw the same after furnishing the necessary identification and bank details. The Registry to ensure that this amount is directly transferred into the appellant's bank account.

27. The appeal is disposed of in the above terms without any cost order.

28. Misc. applications, if pending, are also disposed of.

M. S. SONAK, J.

NITI K
HALDANKAR

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